Supreme Court, U.S.
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No. 89-275

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COOTER & GELL,

Petitioner,

v.

HARTMARX CORPORATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S BRIEF

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QUESTIONS PRESENTED*

1. Whether authority exists to impose Rule 11 sanctions following a plaintiff's voluntary dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(i).

2. Whether review of Rule 11 sanctions under an "abuse of discretion" standard is appropriate.

3. Whether a Court of Appeals can automatically impose Rule 11 sanctions for an appeal upon affirmance of a Rule 11 award.

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* The Court's grant of certiorari on October 16, 1989 limited review to these three questions.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption to the Petition, Danik, Inc. was a Plaintiff in the District Court. The Court of Appeals dismissed Danik's appeal for failure to prosecute. Danik is now bankrupt.

Respondents include Hart, Schaffner & Marx Corporation and Hickey-Freeman Co., Inc., wholly-owned corporate subsidiaries of Hartmarx Corporation.

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PETITIONER'S BRIEF

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Cert. P. App. 1a-17a) is reported at 875 F.2d 890 (D.C. Cir. 1989). The ruling of the United States District Court for the District of Columbia granting sanctions (Cert. P. App. 18a-31a) is reported at 120 F.R.D. 439 (D.D.C. 1988).

JURISDICTION

The judgment of the Court of Appeals was entered on May 19, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Certiorari was granted on October 16, 1989.

STATUTORY PROVISIONS INVOLVED

Respondent Hartmarx Corp., et al., filed for sanctions against Petitioner Cooter & Gell pursuant to Fed. R. Civ. P. 11 which provides in relevant part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading . . .; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the expenses reasonably incurred because of the filing of the pleading, motion, or other paper including a reasonable attorney's fee.

Prior to a ruling on that Motion, Danik, Inc. voluntarily dismissed its complaint pursuant to Fed. R. Civ. P. 41(a)(1)(i) which provides:

> Subject to the provisions of Rule 23(e) . . . an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs. . . .

Petitioner contends that absent a finding of frivolousness under Fed. R. App. P. 38, sanctions may not be imposed for Petitioner's appeal. Fed. R. App. P. 38 provides:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

STATEMENT OF THE CASE

This case arises from litigation between a discount men's clothing company, Danik, Inc. (hereinafter "Danik"), against Hartmarx Corporation, a leading manufacturer of men's suits and three of its subsidiaries (two of which, Hart, Schaffner & Marx Corporation, and Hickey-Freeman Co., Inc. are Respondents herein).[1] Litigation between Danik and Hartmarx began in 1983 with the filing of a lawsuit by a Hartmarx subsidiary, Intercontinental Apparel, Inc., against Danik for money owed on a contract for clothing supplied to Danik. Danik filed a counterclaim alleging Robinson-Patman Act violations by Intercontinental. Two other suits, including the underlying action here, were filed by Danik against Hartmarx and its subsidiaries, alleging various violations of federal antitrust law.

Petitioner, the District of Columbia law firm of Cooter & Gell, represented Danik in each suit. As a result of its filing a class action complaint against the Respondents on November 29, 1983, Respondents filed a motion to dismiss and simultaneously sought sanctions under Rule 11 against both Petitioner and Danik. Petitioner subsequently filed a notice of dismissal of the complaint on April 30, 1984, and thereafter sought and obtained the District Court's approval to dispense with notice to the identified class on July 31, 1984.[2]

The owners of Danik had been in the men's clothing business in the Washington area since 1969. (J.A. 28).

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[1] For the Court's convenience, Hartmarx, the parent company, and its two subsidiaries who are Respondents herein will be referred to jointly as Respondents, since no argument is made on behalf of any Respondent individually. The individual Respondents will be identified by name when their identities are relevant to the facts or legal arguments presented herein.

[2] Danik requested on May 9, 1984 that the District Court allow Danik to dispense with notice of the dismissal to the class that had been identified in the complaint. Respondents did not oppose this motion.

At the time Intercontinental filed its suit, Danik operated five stores at different locations. (J.A. 29). John Dashtara and Dar Dash, the owners of Danik, complained to Petitioner that Danik had been compelled to pay higher prices for suits purchased from Intercontinental than its competitors had paid for the same suits, and believed that Intercontinental was discriminating against Danik in favor of direct competitors. (J.A. 55-57). They also complained that, although they had been able to purchase goods from Intercontinental, for years they had been unable to purchase suits from Hartmarx's better lines manufactured by Hart, Schaffner & Marx and Hickey-Freeman, two of the Respondents. (J.A. 57).

Based on these complaints, Petitioner conducted an investigation of the price discrimination claims in the *Intercontinental* case and concluded, on the basis of an examination of the prices charged to Danik's principal competitor, Syms, that it was apparent that Syms was able to purchase from Intercontinental the same clothes which Danik purchased, but Syms was paying a much lower price. (J.A. 55-57). The reasonableness of Petitioner's investigation in the *Intercontinental* case and the existence of a factual basis for the Robinson-Patman counterclaim filed on Danik's behalf were never doubted by the District Court.[3]

During discovery in the *Intercontinental* case, Petitioner took a deposition at Intercontinental's assembly plant in Buffalo, New York, and examined the invoices of Syms, Danik's principal competitor. Although prior to this deposition Respondents' counsel denied that Syms had received any discounts (J.A. 55-56), Petitioner discovered that Syms in fact received approximately a 20% across the board discount from the prices charged Danik.

[3] The *Intercontinental* case was tried in February 1985, one and one-half years after the voluntary dismissal in the *Hartmarx* case. Although Danik ultimately lost its Robinson-Patman Act counterclaim in *Intercontinental*, it did so only after a jury trial in which liability was vigorously tested on both sides.

This confirmed Danik's allegations of price discrimination and alerted Petitioner to be wary of the representations made by Respondents' counsel. (J.A. 56).[4]

In addition to complaining to Petitioner about the price discrimination it perceived in favor of Syms, John Dashtara and Dar Dash also told Petitioner that, based upon their experience in the retail clothing business and their knowledge of the national market in men's clothing, they believed that Respondents were engaged in exclusive dealing practices which were designed to artificially inflate prices in up-scale men's suits. They informed Petitioner that Danik had been trying unsuccessfully for years to purchase more up-scale suits from Respondents and that they believed that the prices for these suits were inflated as a result of the deliberate marketing practices of Respondents. (J.A. 57).

The deposition in Buffalo not only confirmed price discrimination in favor of Syms in Washington, it also led to a discovery that there apparently was price discrimination in every city (at least seven or eight which Petitioner was able to discover) in which Syms did business. (J.A. 56). Because this discovery also confirmed allegations made by Danik, it led Petitioner to take the owners' additional claims of price-fixing and exclusive dealing more seriously. (J.A. 56-57).[5]

Once Petitioner decided that the allegations of price-fixing and exclusive dealing warranted serious considera-

[4] Petitioner described at some length to the District Court its reaction to discovering that the actual prices charged Syms by Intercontinental were discounted, despite counsel's assurances that they were not. (J.A. 56). Counsel for Respondent contended that all he ever stated was that Intercontinental's practices did not constitute an antitrust violation.

[5] The principal owner of Danik, John Dashtara, told Petitioner that it was his understanding that Respondents engaged in a nationwide practice of limiting sales of certain lines of suits to exclusive dealers and that the practice resulted in artificially high prices. (J.A. 57).

tion, Dale A. Cooter, lead counsel for Danik, directed others in the firm to conduct a telephone survey to determine whether these allegations could be corroborated. Petitioner filed four affidavits in response to Respondents' Rule 11 motion which describe its investigative efforts. (J.A. 16-27).

The telephone survey itself was supervised by Joseph Cahill, one of the partners in Cooter & Gell. Mr. Cahill's affidavit states that, based on information received from Danik principals concerning not only Washington, but also other major metropolitan areas, he directed a secretary, Faye Reid, to telephone retailers in Washington, D.C., Philadelphia, Pennsylvania, and New York, New York, to determine whether there was more than one retailer of Hart, Schaffner & Marx suits in each city. (J.A. 22-23). As set forth in her affidavit, Ms. Reid made numerous telephone calls, and found that only one retailer in each city carried the suits. (J.A. 16-17). Cahill also telephoned a number of retailers in the Baltimore area, who indicated that only one store carried these suits. (J.A. at 23).

Dale Cooter filed the third affidavit and indicated that in filing the complaint, his firm was relying on information provided by Danik with respect to Respondents' local and national marketing practices, corroborated by the telephone survey. (J.A. 24-27). Just as the Buffalo deposition had corroborated Danik's claims of price discrimination, the calls made to major East-coast cities corroborated Danik's allegations that Respondents were engaged in a standard, nationwide marketing practice. At this point, Petitioner was prepared to trust Danik's representations concerning inflated prices, in view of Danik's experience in the industry and its knowledge of general pricing practices in the industry. (J.A. 56-58).[6]

[6] Danik suggested to Petitioner that there were no real differences between suits bearing a number of different labels—*i.e.*, Hart, Schaffner & Marx v. Hickey-Freeman—which Respondents manufactured, and that the national sales policies were substantially the same for both Hart, Schaffner & Marx and Hickey-Freeman. Danik explained also that it had been unable to purchase up-scale suits from either of the Hartmarx subsidiaries and that it viewed the prices of suits manufactured by both as artificially high.

After making this investigation, Petitioner consulted a former Chief of Litigation at the Federal Trade Commission, who suggested that Petitioner had two substantial class action complaints based on the information provided by Danik and the investigation that had corroborated that information. (J.A. 58-59). Before filing either suit, however, Petitioner drafted complaints and contacted both the general counsel for Hartmarx in Chicago and outside counsel who represented Intercontinental as well as Respondents. (J.A. 59-60). Petitioner first telephoned the general counsel and outlined the antitrust violations which it believed Respondents were committing. Thereafter, Petitioner provided copies of both draft complaints by mail to the general counsel. At or about the time these copies were provided, Petitioner gave copies to the outside counsel and indicated that it would give them whatever time they needed to review the complaints. (J.A. 59-60).

After Petitioner afforded both the general counsel and outside counsel a week or ten days, plus another week's extension, to review the complaints, Respondents' counsel indicated that they had no intention of discussing the proposed complaints with Petitioner. As affidavits of Mr. Cooter and one of Respondents' outside counsel, Jeffrey Gordon, both indicate, at no time was a suggestion made that the two proposed class action complaints were procedural devices to promote a settlement in the *Intercontinental* case. (J.A. 26-27; Attachment to District Court Docket Entry 12 (Gordon Affidavit)). Indeed, Mr. Gordon and Mr. Cooter both recall that Mr. Cooter expressed his belief that the threatened liability of Intercontinental and other defendants in the class ac-

tions far exceeded the amount owed by Danik on Intercontinental's contract claim. (J.A. 26-27; Attachment to District Court Docket Entry 12).

At no point did any Hartmarx representative or counsel suggest that the price-fixing-exclusive dealing allegation at the core of the class action complaint was based on inaccurate information. Only after Petitioner learned that neither the Hartmarx general counsel nor the outside counsel had any interest in discussing the complaint was it filed in the District Court.[7]

The complaint alleged violations of the Sherman Antitrust Act, 15 U.S.C. § 1 and the Clayton Antitrust Act, 15 U.S.C. § 12. After the complaint was filed, Respondents filed a motion to dismiss accompanied by affidavits of officers of Respondents. These affidavits denied exclusive dealing arrangements and purported to identify how many retailers in major metropolitan areas with whom these subsidiaries dealt. (*See* Attachments to District Court Docket Entry 12). Thereafter, Nicholas Hantzes, a Cooter & Gell associate, did further investigation and discovered that in telephone books for major metropolitan areas, retailers were listed as "exclusive dealers" for both subsidiaries. (J.A. 18-21). He also discovered that, to the extent other retailers advertised that they sold Respondents' merchandise, they only carried specialty sizes of those items—*i.e.*, big or tall, or short. The pattern which became apparent to him was that, despite Respondents' affidavits which claimed numerous retailers in each city, the metropolitan areas contained only one retailer who sold a full selection of Respondents' prod-

[7] Mr. Cooter stated in his argument to the District Court that, based on the erroneous information obtained from Respondents' counsel in the *Intercontinental* case, he was not sure that he would have believed a denial by Respondents of the allegations of the complaint. (J.A. 61). At no time however, did Mr. Cooter or any other Cooter & Gell attorney suggest that they would have declined to investigate any information that Respondents chose to provide.

ucts. (J.A. 20-21). He also learned that in the Western States, the suits could only be purchased from retailers that were Hartmarx subsidiaries. (J.A. 20). He concluded that a strong case remained that the Respondents had established a network of exclusive dealerships as originally alleged in the complaint. (J.A. 20-21).

In February 1984, following the filing of the Rule 11 motion, Respondents took the deposition of John Dashtara, Danik's president.[8] Dashtara arrived in the United States shortly before he entered the clothing business in 1969, and he had some difficulty in reading English. He explained that the complaint which he verified had been read to him by his sister-in-law. (J.A. 31). In response to a series of questions put to him by Respondents' counsel, Dashtara indicated that he had relied upon the advice of counsel in verifying the complaint and that he had done no independent "investigation" of the factual allegations made in the complaint. (J.A. 33-35). At no point was Dashtara asked about his general knowledge of the men's clothing business or of his beliefs concerning the degree to which suits manufactured by Respondents were sold at inflated prices.

During the deposition, Mr. Cooter, on behalf of Petitioner, stated as follows:

> . . . Mr. Favretto, in your moving papers somewhere pursuant to Rule 11 you indicated that you would be happy to depose Mr. Dashtara or myself of [sic] other representative of my law firm with respect to what independent investigation we made prior to the filing of the Complaint to determine whether or not we would file it in a good faith belief that it was true. *I will be happy to submit myself or* [sic] *other member of my law firm for deposition for*

[8] Petitioner filed a motion for protective order to prevent the taking of this deposition on the grounds that it was premature. (District Court Docket Entry 9.) This motion was denied. (Docket Entry 17.)

> *that limited purpose without in any fashion waiving any attorney-client privilege or without in any fashion suggesting that I am a proper witness in this case. If you want to do that, I will be happy to give you all the information you want.* Obviously, Mr. Dashtara, as you know from the response to Rule 11, didn't make the investigation. We did, and now its crystalline.

(J.A. 34-35). During the deposition, Petitioner made every effort to assure that Danik's attorney-client privilege was neither violated nor inadvertently waived. In order to assure Respondents' counsel that they could have full information concerning all investigative efforts made prior to filing the complaint, Mr. Cooter stated as follows:

> I have offered to make the lawyers available who have firsthand knowledge with respect to the inquiry made. Just because [Dashtara's] knowledge is derivative from the law firm does not mean that he is required to disclose privileged conversations between himself and counsel, nor will I allow him to. I instruct him not to answer. I would be happy, pursuant to your papers, to give you people who can answer your inquiry.

(J.A. 37).[9]

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[9] Some of the questions put by Respondents' counsel were ambiguous at best and subject to misinterpretation at worst. For example, counsel called this sentence from paragraph 26 of the complaint to Dashtara's attention: "Upon information and belief, either as a condition of the exclusive retailer status or by agreement with the retailer, Hart, Schaffner and Marx and Hickey-Freeman men's suits are sold by the retailer at the defendants' suggested retail price or at an artificially high price." Dashtara was then asked whether he had an independent reason to believe that the allegation was true, other than what Petitioner had told him. (J.A. 38). The entire thrust of the deposition was to the effect that Petitioner discussed its investigation with Dashtara and that he verified the complaint, which was phrased in legal terms, on the basis of the discussion. Dashtara was never asked the simple question whether

Like many lawyers and firms who have been confronted with Rule 11 motions, Petitioner found itself walking a tightrope both in the deposition and thereafter in providing affidavits and making arguments to the District Court. Had Petitioner identified communications by Danik principals upon which Petitioner relied, Danik might have suffered the loss of its attorney-client privilege. Yet, Petitioner could not adequately respond to the Rule 11 motion without relying to some extent on the information conveyed to it by its clients, who had more than a decade of expertise in the men's clothing business and whose information had been corroborated in the *Intercontinental* case. Since the *Intercontinental* case remained pending, any waiver of the privilege or dispute between Danik and Petitioner as to what was said prior to the filing of the complaint might have prejudiced that case.

In April 1984, Petitioner decided to dismiss the class action suit because it lacked the resources to try the *Intercontinental* case while simultaneously pursuing the class action. (J.A. 63-65). Mr. Cooter explained to the District Court that he was a partner in a 12-lawyer firm engaged in litigation against Respondents' law firm, Mayer, Brown & Platt, a major Chicago and national firm. Mr. Cooter decided that he could not pursue the class action and at the same time adhere to the tight discovery schedule imposed by the District Court in the *Intercontinental* case. (J.A. 64-65).

Petitioner therefore filed its notice of dismissal pursuant to Rule 41(a)(1)(i) on April 30, 1984. It was

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he had the belief, prior to the filing of the complaint, that Respondents produced up-scale suits which were sold at artificially high prices and that they sought to encourage this result by restricting the dealers with whom they dealt. Moreover, it was imperative that Petitioner object to questions that called for Dashtara to reveal what he had said to counsel, lest the attorney-client privilege be inadvertently waived.

aware, however, that Rule 41 provided that any dismissal in a class action suit is subject to Rule 23(e), and therefore filed a motion on May 9, 1984 to dispense with notice of the dismissal to the identified class. Between the time that the dismissal notice was filed and July 31, 1984, when the District Court granted the motion to dispense with notice, the District Court heard argument on the Rule 11 motion and purported to take the matter under advisement. At the time of the Rule 11 argument, the case was not finally terminated because the May 9 motion to dispense with notice was still pending. On July 31, 1984, the Court granted the motion and the dismissal notice was fully effective.[10]

No action was taken with respect to the Rule 11 motion for nearly four years after Respondents filed their motion, and approximately three and one-half years following the grant of the motion to dispense with notice to the class. In late 1987, Dale Cooter represented American Security Bank in *Kuwait Airways Corp. v. First American Bank, N.A., et al.*, Civ. No. 86-2542, another lawsuit pending before the same District Court (the Honorable Oliver Gasch). This lawsuit was completely unrelated to the Danik litigation. It was a vigorously contested trial that lasted several weeks. Two weeks after the conclusion of the *Kuwait* trial, on December 2, 1987, the District Court, *sua sponte*, entered an order which stated that Respondents' long dormant Rule 11 motion was "ripe for decision" and directed Respondents to furnish the court with a statement of fees and costs. The District Court denied Petitioner a further hearing on the Rule 11 motion, and failed to identify any circumstance that made the motion "ripe." On December 23, 1987, Respondents filed their statement, seeking almost $62,000 in sanctions. The District Court determined that Respondents' request was excessive and ultimately imposed sanctions of $21,452.52 against Petitioner and $10,701.26 against Danik.[11] Both Petitioner and Danik appealed; Danik's appeal was dismissed for failure to prosecute following a bankruptcy, and the Court of Appeals affirmed the sanction against Petitioner. This Court granted certiorari to review the three questions set forth, *supra*.

[10] Had the District Court granted the Rule 11 motion prior to ruling on the Rule 23(e) motion, the argument could be made that the sanction was imposed prior to the effective date of the Rule 41 dismissal. It is clear, however, in this case that both parties and both lower courts concluded that the dismissal was plainly effective prior to the award of sanctions.

The District Court justified its ruling by finding that Petitioner had not done an independent investigation of Hickey-Freeman and had confined its investigation to Hart, Schaffner & Marx; that Petitioner had not made a sufficient "systematic inquiry" among retailers; and that Petitioner had not sufficiently examined the anti-competitive effects of Respondents' practices. The court declined to treat the failure of Respondents' counsel to identify their concern about the complaint at the time they were provided a draft as a bar to the recovery of sanctions.

At no point did the District Court or Respondents challenge any of the representations made by Petitioner with respect to the investigation that had been made. Thus, the District Court imposed sanctions in a case in which the following facts were undisputedly true and implicitly regarded as irrelevant:

> 1. Petitioner had been informed about industry practice by its clients, who had substantial experience in the men's clothing business.

[11] This Court has recently heard argument in *Pavelic & Leflore v. Marvel Entertainment Group*, 854 F.2d 1452, *cert. granted*, —— U.S. ——, 109 S.Ct. 1116 (1989), in which, as here, sanctions were imposed on the *law firm*, rather than on the individual attorney. Should this Court find that sanctions may only be imposed on the individual attorney and not on the firm, Petitioner respectfully submits that this case be reversed on grounds of plain error.

2. The allegations made by the clients with respect to price discrimination in the *Intercontinental* suit were corroborated by an independent investigation, and these allegations involved a number of cities outside the Washington area.

3. Prior to filing a complaint in the class action suit, Petitioner made telephone calls to several major cities and received information that corroborated the information they had received from their clients. The information was not inconsistent with a nationwide practice on the part of Respondents.

4. Prior to filing the complaint, Petitioner provided copies to Hartmarx's general counsel and to Respondent's outside counsel and offered to give them as much time as was required for them to analyze the complaint. Petitioner provided an extension of time when asked. No suggestion was made by Respondents that the allegations concerning exclusive dealing, which was the key to inflating prices according to the complaint, were incorrect.

5. Respondents were fully aware that when representations had been made by Respondents concerning the prices charged to Danik's competitors in the Intercontinental case, Petitioner carefully and faithfully arranged to examine the relevant documents to ascertain whether the representations were correct. Although Petitioner concluded that Respondents' outside counsel had given them information that did not appear to be consistent with what Petitioner learned in discovery in the *Intercontinental* case, and expressed reservations about believing additional representations, at no time did Petitioner ever express any reluctance to investigate fully any information that might have suggested that its factual theory or the information provided by its clients was incorrect.

6. Petitioner had offered to make available for depositions any of its lawyers to explain their reliance on Danik's information and the ways in which they sought to corroborate it.[12]

Cooter & Gell appealed the imposition of sanctions. The appeal was based on the claim that the District Court lost jurisdiction over the motion when the case was voluntarily dismissed. Cooter & Gell further argued that even if the court retained jurisdiction, the sanctions were improperly imposed because the prefiling inquiry conducted was objectively reasonable. Cooter & Gell also claimed the award was excessive. The Court of Appeals rejected Cooter & Gell's arguments, upheld the District Court decision, and additionally ordered Cooter & Gell to pay Hartmarx's attorney's fees for the appeal. The Court of Appeals affirmed the District Court without relying on the District Court's finding that Petitioner did not adequately investigate the anticompetitive effects of the behavior which it alleged in the complaint.[13]

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[12] Neither Respondents nor the District Court expressed any interest in such explanations.

[13] At the time the class action suit was filed alleging an intracorporate conspiracy implemented in part by exclusive dealing arrangements, the complaint stated a sound antitrust claim under the law as it stood at the time. The incapacity of a parent and its wholly-owned subsidiary to conspire in violation of Sec. 1 of the Sherman Act was only later settled by *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Obviously, changes in the law between the District Court finally imposed sanctions, filed, and 1988, when the District Court finally imposed sanctions, would have suggested that in 1988 a plaintiff would not have filed the same complaint which Danik filed five years earlier. *See, e.g., Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984); *Northwest Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). But, the test for Rule 11 is whether the complaint was reasonable in fact and law when it was filed. The authorities make it clear that Danik had a firmly grounded complaint. As set forth above, Danik also relied upon an antitrust expert to provide counsel before the complaint was filed.

SUMMARY OF THE ARGUMENT

Petitioner submits that a voluntary dismissal under Rule 41(a)(1)(i) ends a case and removes authority of a district court to impose sanctions under Rule 11 or other rules of civil procedure. This argument is supported by the language of Rule 41, a comparison of the language of Rules 41 and 11, the history of Rule 41, and the policies that support voluntary dismissal under Rule 41(a)(1).

The text of Rule 41(a)(1)(i) plainly indicates that a plaintiff has an option of dismissing, without prejudice, prior to the time a defendant has either answered or moved for summary judgment. A comparison of Rules 41(a) and 41(b) demonstrates that the district court's authority to impose conditions upon dismissal is confined to dismissals falling within subsection (b) and is not extended to voluntary dismissals prior to answer or a summary judgment motion. If Rule 11 permits the district court to impose costs and fees on a plaintiff who dismisses under Rule 41(a)(1)(i), there is no longer any real difference between that rule and Rule 41(b), and the historic role of Rule 41(a)(1)(i)—to provide a plaintiff with an opportunity early in a case to abandon it without limitation—will be destroyed while Rule 41(a)(1) will become redundant.

Moreover, if the district court has the power to impose fees and costs following a dismissal under Rule 41(a)(1)(i), there is no longer any right to a dismissal without prejudice. The imposition of fees and costs often, if not always, involves some look at the merits of the complaint, and it is linguistically impossible to treat a dismissal that is accompanied by sanctions as being without prejudice.

Also, if the district court retains power under Rule 11 to impose sanctions following a voluntary dismissal, presumably the scope of the sanctions would be as broad in

the case of a Rule 41(a)(1)(i) dismissal as in any other case. Thus, the district court would have the power to order a dismissal with prejudice, even though Rule 41(a)(1)(i) guarantees a right to a dismissal without prejudice. This possibility demonstrates that Rule 11 must bow to Rule 41(a)(1)(i).

The history of Rule 41(a) bolsters Petitioner's analysis of the plain language of the rule. This Court has chosen over the years to retain a plaintiff's right to unlimited dismissal prior to the filing of designated pleadings, and it has clearly provided that a plaintiff may dismiss without limitation unless and until a defendant files an answer or moves for summary judgment.

The Court has wisely left Rule 41(a)(1)(i) available to plaintiffs, and the utility of that rule and the goals of the Federal Rules of Civil Procedure would be undermined by a holding that a district court may impose sanctions upon lawyers and their clients even after a complaint is dismissed under Rule 41(a)(1)(i). As this case demonstrates, post-dismissal Rule 11 sanctions encourage satellite litigation, threaten attorney-client relationships, engender extensive delays in final termination of cases, and produce unnecessary appeals. The advantage of Rule 41(a)(1)(i) dismissals is that they put a quick, clean end to litigation before it has gone far. To permit a district court to impose sanctions after dismissal, either *sua sponte* or at the request of a party, will deter reliance on the voluntary dismissal rule, encourage defendants to hold back information until after a complaint is filed (as the Respondents did in this case), and to use Rule 11 as a continual threat to chill plaintiffs from pursuing legal remedies.

There is no need for Rule 11 sanctions following a Rule 41(a)(1)(i) dismissal, as the instant case so clearly demonstrates. Had Respondents reviewed Danik's complaint and pointed out any alleged major errors in it, Danik would have been able to conduct further investiga-

tion and Respondents would never have had occasion to file a Rule 11 motion. This Court is most likely to discourage wasteful litigation and unhelpful posturing by litigants if it encourages exchanges of information rather than Rule 11 motions, which is exactly the result that will be likely if the Court accepts Petitioner's argument that Rule 11 sanctions may not be imposed following a dismissal under Rule 41(a)(1)(i).

Assuming, however, that Rule 11 sanctions may be imposed following a Rule 41(a)(1)(i) dismissal, Petitioner asks that this Court differentiate the various tasks that a district court performs when it resolves a Rule 11 motion in deciding the proper scope of appellate review. For reasons that will be developed more fully, *infra*, Petitioner submits that the clearly erroneous standard of review is appropriate when a district court engages in traditional fact-finding (assuming that the fact-finding follows a hearing or a proceeding in which facts may fairly be determined). The abuse of discretion standard, such as the one utilized below by the Court of Appeals, is appropriate when an appellate court examines the sanctions actually imposed following a correct ruling that Rule 11 has been violated.

It is important, however, that these aspects of a Rule 11 motion be distinguished from three others: the application of the facts to the standard set forth in Rule 11, the determination of the proper procedures to be employed in a Rule 11 proceeding, and the definition of a defendant's duty to mitigate and the scope of that duty. These are all questions of law and should be subject to *de novo* review in the courts of appeal.

The first issue, whether the facts found by the district court constitute a Rule 11 violation, is a determination as to what is unreasonable as a matter of law. When a trial court decides that under the circumstances a lawyer or litigant who filed a complaint acted unreasonably, the

court is declaring for the entire bar that the identified behavior is legally deficient and cannot be deemed reasonable. Such a declaration is an announcement that reasonable minds will not be permitted to differ on the point, and in the end it constitutes a rule of behavior that is binding on the lawyer or litigant who is sanctioned and all others who follow in the district courts of the United States. The importance of such an announcement of a legal principle requires the most careful, *de novo* review lest there be inconsistent results and confusion that will threaten the concept of equal justice under law.

Similarly, the question whether certain procedures are adequate or tolerable in a Rule 11 procedure is a question of law, as to which no deference is required by an appellate court. In the instant case, for example, Petitioner contends that nearly a four year delay between its notice of voluntary dismissal and the District Court's Rule 11 sanction is unreasonable and totally indefensible in view of the deterrent purpose of Rule 11. Moreover, such delays threaten to chill any lawyers over whose head such sanctions are left hanging for an extended period. Such delay should be deemed legally impermissible.

Equally impermissible is a defendant's willful failure to identify defects in a complaint when it is given unlimited time to review the complaint prior to its filing and, instead of pointing out factual errors, invites the plaintiff to file. Such conduct followed by a Rule 11 motion turns the rule from a protective device for defendants into a weapon to chill and frustrate plaintiffs who seek to confirm their facts before they initiate suit. No defendant should be permitted to rely on Rule 11 when it has had a full opportunity to correct any error in a pleading before filing, and it has chosen not to do so.

Finally, Petitioner contends that Appellate Rule 38, not Rule 11, governs the imposition of sanctions on appeal. This result is required by the plain language of

both rules, with Rule 38 on its face setting forth the standard against which appeals are to be governed. Reliance on Rule 11 would frustrate legitimate appeals by lawyers whose reputations are called into question and who have substantial legal questions to argue on appeal. It would discourage legitimate, good faith appeals, for no valid reason. Any prevailing party in a Rule 11 proceeding may choose to rely on the district court's findings and reasoning on appeal, and an appellate court has ample procedures available to assure that streamlined appeals are possible in insubstantial cases. Were sanctions under Rule 11 automatically imposed against any litigant or lawyer who unsuccessfully appealed district court sanctions, an inequality between litigants who have been sanctioned and those have not been would be created: those who have been sanctioned in the district court would be discouraged from appealing, while those who unsuccessfully sought district court sanctions would be free to appeal without worrying about sanctions. Such a result would be unfair.

ARGUMENT

I. THE DISTRICT COURT ERRED IN IMPOSING RULE 11 SANCTIONS FOLLOWING DANIK'S DISMISSAL UNDER RULE 41(a)(1)(i)

As set forth above, on April 30, 1984, Danik filed a Rule 41(a)(1)(i) notice dismissal. The case was dismissed to conserve financial and manpower resources (J.A. 63-65), not because Danik or Petitioners believed that the claims lacked merit.[14] After the dismissal, cer-

[14] Danik's complaint alleged price-fixing, fostered by an exclusive dealing arrangement that excluded Danik, a paradigm antitrust violation. Nevertheless, Petitioner ultimately decided to voluntarily withdraw the case under Rule 41(a)(1)(i); that decision was based upon the burdens of litigating several cases simultaneously.

The affidavits which Respondents filed in support of both their their motion to dismiss and their Rule 11 motion were not persuasive refutations of the central theory of Danik's class action complaint. Respondents' affidavits denied that they had exclusive dealer arrangements in all major metropolitan areas. (*See* Attachments to District Court Docket Entry 12). But, as the affidavit of Mr. Hantzes, which was based on his investigation into several of the metropolitan areas mentioned in Respondents' affidavits, revealed, the arrangements that Respondents had with dealers in these areas might well have had aspects of exclusivity. (J.A. 18-21). Moreover, Respondents' affidavits completely failed to mention the locations within the major metropolitan areas of its various retailers. Because of the size of some markets, a combination of geographical separation among retailers plus active allocation by Respondents of lines of clothes would have achieved much the same result as a simple exclusive dealing arrangement. Although Danik's complaint alleged that the prices charged for Hart, Schaffner & Marx and Hickey-Freeman suits were inflated (J.A. 11-13), Respondents' affidavits did not deny this. Nor did Respondents' affidavits deny that the prices were relatively uniform in major metropolitan areas. And while Respondents' affidavits did deny pricing agreements between Respondents and retailers, Hart, Schaffner & Marx was forced to concede that it had recommended prices to retailers. (*See* Attachments to District Court Docket Entry 12). Such recommendations could well have promoted price fixing both as to a particular line of suits and as to other suits—*e.g.*, Hickey-Freeman—as well. Thus, at the time that Petitioner voluntarily dismissed its complaint, it had no solid evidence that the allegations made by Danik were not true in all material respects.

certainly Cooter & Gell and Danik, and probably even Hartmarx, believed that the case was finished. Nevertheless, nearly four years later, after Mr. Cooter had appeared before Judge Gasch in the *Kuwait* case, the District Court, *sua sponte*, issued its order declaring Defendants' Motion for Sanctions, filed years before, "ripe for decision." Cert. Appendix at 32a.

A. The Plain Language of Rule 41(a)(1)(i) Provides An Unfettered Right To Dismiss

Unlike other cases in which the Court is asked to construe a statute to determine congressional intent, in this case the Court must construe rules which it approved and sent to Congress. Petitioner contends that the best read-

ing that fosters the goals of the Federal Rules of Civil Procedure ("[the rules] shall be construed to secure the just, speedy and inexpensive determination of every action," Fed.R.Civ.P. 1), is that a plaintiff has the right to dismiss an action under Rule 41(a)(1)(i) prior to the filing of a responsive pleading or a motion for summary judgment, and that the dismissal does not leave the plaintiff or its counsel subject to Rule 11 sanctions.

On its face, Rule 41(a)(1)(i) states that "an action may be dismissed by the plaintiff without order of court" prior to the service of an answer or motion for summary judgment, and that unless otherwise stated in the notice of dismissal it is without prejudice. The language suggests that a plaintiff is permitted to withdraw an action without penalty as long as the action has not proceeded to the point of an answer or a summary judgment motion. This reading of Rule 41(a)(1)(i) is supported by an examination of Rule 41(a)(2), which provides that, except for dismissals under (a)(1), "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." It is apparent that this Court intended that the power of a district court to enter orders—*e.g.*, for payment of fees or costs—as a condition of a dismissal should be restricted to dismissals under 41(a)(2) and does not apply to dismissals under 41(a)(1).

If Rule 11 sanctions may be imposed following a voluntary dismissal under Rule 41(a)(1)(i), there is no longer a right of a dismissal without prejudice, since the award of sanctions, as in the underlying case herein, may signify a district court's judgment on the merits. Moreover, the availability of sanctions may discourage dismissals and encourage parties or counsel to continue cases in order to assure that a more complete record is available to respond to Rule 11 motions or anticipated motions. The lesson of the instant case, for example, might well be that dismissal should not have been sought,

and counsel should instead have engaged in discovery in order to demonstrate more fully the merits of the plaintiff's position or the extent to which that position was actually justified when the complaint was filed.

Perhaps the clearest problem with reading Rule 11 as permitting sanctions even after a dismissal under Rule 41(a)(1)(i) is that the language of Rule 11 purports to require a court to impose "an appropriate sanction" for a violation. As one commentator has noted, "[t]here are no limits placed on judicial creativity in fashioning an appropriate sanction." [15] The same commentator has observed that "[t]he courts' authority to dismiss an action, pleading, claim or defense as a remedy for a Rule 11 violation is well settled." [16] If a court may impose a range of sanctions, including dismissal of an action with prejudice, which is nowhere prohibited by Rule 11, the plain language of Rule 41(a)(1)(i)—which provides for dismissal *without prejudice*—can be circumvented by the power conferred by Rule 11.

Consistent with the plain language of Rule 41, Petitioner urges this Court to adopt the rulings of *Johnson Chemical Co., Inc. v. Home Care Products, Inc.*, 823 F.2d 28 (2d Cir. 1987), and *Santiago v. Victim Services Agency*, 753 F.2d 219 (2d Cir. 1985), that once a Rule 41(a) dismissal is filed, the district court is deprived of authority to impose Rule 11 sanctions. *But see Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987), *cert. denied*, —— U.S. ——, 108 S. Ct. 1101 (1988), (explicitly rejects *Santiago* and allows post-dismissal sanctions); *Greenberg v. Sala*, 822 F.2d 882 (9th Cir. 1987); *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600 (1st Cir. 1988).

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[15] G. Joseph, Sanctions: The Federal Law of Litigation Abuse § 16B., at 217 (1989).

[16] *Id.*

In reversing a post-dismissal award of attorney's fees, the Second Circuit in *Santiago* stated that, "[o]nce the plaintiff has dismissed the action . . . the Court loses all jurisdiction over the action." *Santiago*, 753 F.2d at 221. In *Johnson Chemical Co., Inc. v. Home Care Products, Inc.*, 823 F.2d at 30, the district court had granted the defendant's motion to vacate the plaintiff's voluntary dismissal and sanctioned the plaintiff under Rule 11. Reversing the trial court, the Second Circuit held that the plaintiff has the "unfettered power" to file a notice of dismissal before an answer or motion for summary judgment has been filed. *Id.* (citing *Santiago*, 753 F.2d at 221). The reviewing court concluded that since the plaintiff was plainly entitled to a voluntary dismissal, the district court lost all jurisdiction after the plaintiffs voluntarily dismissed, and therefore, Rule 11 sanctions could not be imposed. *Id.* at 31.

Similarly, the Fifth Circuit has consistently held that Rule 41(a)(1)(i) means just what it says. *See Williams v. Ezell*, 531 F.2d 1261 (5th Cir. 1976) (where defendants filed neither an answer nor a motion for summary judgment prior to plaintiffs' notice of voluntary dismissal, district court had no power or discretion to deny plaintiffs' right to dismiss or to assess attorney's fees against them); *see also Carter v. United States*, 547 F.2d 258 (5th Cir. 1977) (defendants' motion to dismiss on the merits is not the equivalent of an answer and does not prevent plaintiffs from invoking unfettered right to voluntary dismissal).[17]

B. The History Of Rule 41(a)(1)(i) Supports A Finding Of An Unfettered Right To Dismiss

The history of Rule 41(a)(1)(i) supports the construction urged by Petitioner. When the rule was first adopted in 1938, it provided the plaintiff with a right to dismiss

[17] *Williams* and *Carter* are not Rule 11 cases.

prior to the filing of a responsive pleading. In 1948, the Court amended the rule to provide that the plaintiff's unilateral right to dismiss prior to the filing of an answer did not apply when a motion for summary judgment was filed prior to the filing of the notice of dismissal. The Advisory Committee's Note to the 1948 amendment stated that "[t]he change in Rule 41(a)(1)(i) gives the service of a motion for summary judgment by the adverse party the same effect in preventing unlimited dismissal as was originally given only to the service of an answer." 5 F.R.D. 433, 465-66 (1946). This language recognized that Rule 41(a)(1)(i) was intended to provide for "unlimited dismissal" except as otherwise indicated in the language of the rule.[18] Over the years, suggestions have been made that the unlimited dismissal power be eliminated,[19] but this Court has not acted upon these suggestions.

Rather, the Court has retained Rule 41(a)(1)(i) as a simple, convenient device which permits a plaintiff to withdraw from a case before a defendant has been burdened with extensive litigation. The notice of dismissal is effective when it is filed with the clerk even before service.[20] As one circuit has said, the notice "itself closes

[18] One limitation on Rule 41(a)(1)(i) is that it is subject to Rule 23(e), which states that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." In the underlying class action suit brought by Danik against Respondents, Danik sought and obtained court approval to dispense with notice, and the parties and the lower courts have treated the notice of dismissal as effective.

[19] *See, e.g.*, Note, *Federal Civil Procedure: Voluntary Dismissal Under Rule 41(a)(1)*, 1962 Duke L.J. 285; Note, *Absolute Dismissal Under Federal Rule 41(a); The Disappearing Right of Voluntary Nonsuit*, 63 Yale L.J. 738 (1954).

[20] *Scam Instrument Corp. v. Control Data Corp.*, 458 F.2d 885 (7th Cir. 1972).

the file. There is nothing the defendant can do to fan the ashes of that action into life and courts have no role to play. This is a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court."[21] Voluntary dismissal early in an action fosters the most important goals of the Federal Rules of Civil Procedure, and those goals would be frustrated were voluntary dismissals deemed to be subject to subsequent imposition of sanctions under Rule 11.

C. The Policies Behind Rules 11 And 41(a)(1)(i) Are Furthered By Allowing Plaintiffs An Unfettered Right To Dismiss

Even when dismissals are noticed, subsequent Rule 11 proceedings, as in this case, may protract litigation, result in wasteful district court proceedings, and produce appeals either by lawyers who are sanctioned or by those who have been unsuccessful in seeking sanctions. Instead of being an efficient device to end litigation before it has really developed, which Rule 41(a)(1)(i) has been, it would not end litigation and might well be underutilized by lawyers who would hesitate to dismiss lest a district court wrongly infer that the reason for the dismissal is recognition of a problem with the case that predated the filing of a complaint.

There is no sound reason in experience or policy for construing Rule 11 to permit sanctions once a Rule 41(a)(1)(i) dismissal occurs. In egregious cases, attorney misbehavior may be certified to appropriate bar authories.[22] Or, a court might consider suspending a lawyer's right to practice before it as a result of clearly improper conduct.[23]

Apart from the unique timing question presented by this case—where the court below imposed sanctions almost *four years* after dismissal—there are several reasons to prefer the Second Circuit's holdings in *Santiago* and *Johnson* to that of *Szabo* and its progeny.[24] First, there is the fact that Rules 11 and 41 simply admit to no exception to the "bright line" of the plaintiff's unfettered power to dismiss voluntarily and with finality pursuant to Rule 41(a)(1)(i). *Johnson*, 823 F.2d at 30. If this Court had wished to adopt such an exception, it could have done so, and neither a district court, nor a court of appeals may create authority withheld by the rules.

Second, permitting even this encroachment upon the letter of Rule 41 is to disapprove the many and varied cases interpreting its provisions strictly. *See* 5 J. Moore, J. Lucas & J. Wicker, *Moore's Federal Practice* ¶ 41.02[2] and [3] (2d ed. 1982) and cases collected therein. Many have tried and failed to chip away at the rule's straight-

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[21] *American Cynamid Co. v. McGhee*, 317 F.2d 295, 297 (5th Cir. 1963).

[22] *See, e.g., McGoldrick Oil Co. v. Campbell*, 793 F.2d 649, 653-54 (5th Cir. 1986). The facts of *Danik* illustrate that Respondents could have called any information which they possessed and which rebutted the class action complaint to Petitioner's attention prior to filing anything in the district court, and by doing so they would have imposed a burden on Petitioner to investigate further to assure that its complaint rested on a sound factual and legal theory. Had Petitioner failed to condct an investigation, Respondents could have answered the complaint and included any defenses under Rule 12 in their answer. Once they did so, Petitioner would not have been able to seek a voluntary dismissal, and Rule 11 would have been available as a remedy for any failure on Petitioner's part to conduct a reasonable investigation. This course would advance the goals of the Federal Rules.

[23] *See, e.g., Donaldson v. Clark*, 819 F.2d 1551, 1557 n.7 (11th Cir. 1987) (en banc).

[24] These cases are discussed more fully at page 23, *supra*. In *Santiago*, 753 F.2d 219 and *Johnson*, 823 F.2d 28, the Second Circuit held that a Rule 41(a)(1)(i) dismissal deprived the trial court of jurisdiction to impose attorneys fees (*Santiago*) and Rule 11 sanctions. (*Johnson*). In *Szabo*, the Seventh Circuit allowed post-dismissal sanctions under Rule 11.

forward language without success for, as noted by the Sixth Circuit, "although Rule 41 has been amended three times since 1948, it has not been broadened to include other motions or pleadings which would bar a dismissal by notice." *D.C. Electronics, Inc. v. Martron Corp.*, 511 F.2d 294, 296 (6th Cir. 1975). This consideration—that many years of entirely consistent decisions affirming the unfettered power of a plaintiff to voluntary dismissal would be swept aside by carving an exception for Rule 11 proceedings—was not addressed by *Szabo* or its progeny. This is no small concern; rejection of the accumulated jurisprudence surrounding Rule 41 is to invite other defendants and the district courts to attempt to further transform that which has heretofore been a settled and immutable rule.[25] The *Johnson* opinion respects these precedents and recognizes the value of a settled rule for litigants, while *Szabo* undermines the clarity that previously existed. This indirect and perhaps unintended consequence not only is inconsistent with better jurisprudence but also potentially conflicts with a stated purpose of Rule 11 itself—to increase the efficiency of the judicial system. *See* Fed. R. Civ. P. 11 Advisory Committee Notes, 97 F.R.D. 165, 198 (1983).

Moreover, a finding that authority is retained to impose Rule 11 sanctions after a voluntary dismissal leads to the inevitable question: for how long? In this case, it was nearly four years; in the next case it may be ten years, or indefinitely. A finding that a Rule 41 notice dismissal divests the trial court of authority to impose Rule 11 sanctions avoids this inevitable problem of the length of time in which a court may impose sanctions. The most critical aspect of this problem, as recog-

[25] For example, following a Rule 41(a)(1)(i) dismissal by plaintiff, the district court could attempt to impose sanctions pursuant to Fed.R.Civ.P. 37, or "make such order as it deems just" pursuant to Fed.R.Civ.P. 12(e), including the imposition of costs and fees.

nized by the Court of Appeals, is the chill felt by the lawyer who has other business before the same court while an unrelated Rule 11 motion pends. *See* Cert. Appendix at 10a. Indeed, that is precisely what happened here: nearly four years later, immediately after Mr. Cooter tried another vigorously contested case before Judge Gasch, the Court decided—*sua sponte*—that the long-forgotten Rule 11 motion was "ripe for decision." Under the holding of the Court of Appeals, counsel will proceed very cautiously—at the risk of the case of another client—when appearing before a federal judge who has not yet decided a possibly old and clearly unrelated Rule 11 motion. This problem is exacerbated by the *sua sponte* nature of Rule 11. The language of the rule makes it clear that sanctions may be imposed on the court's own initiative. *See* Advisory Committee Notes, 97 F.R.D. at 197, 200. Thus, in the absence of any cut-off on the right to impose sanctions, counsel will necessarily proceed cautiously in all subsequent litigation before a federal judge.[26]

One other, very practical problem of waiting for so many years is the determination of what law to apply to the previous conduct. Indeed, when Judge Gasch issued his opinion in February 1988, he relied on a body of Rule 11 law that had developed considerably since the 1983 amendments. Cert.P.App. 23a-26a. Thus, he judged

[26] Nevertheless, if this Court finds that a trial judge does retain jurisdiction to decide a Rule 11 motion following Rule 41(a)(1)(i) notice dismissal, it should direct the federal courts, through their local rules, to prescribe a definite time period during which the court retains jurisdiction to impose sanctions. *See, e.g., White v. New Hampshire Dept. of Empl. Sec.*, 455 U.S. 445 (1982) (suggesting that district courts adopt local rules establishing timeliness standards for the filing of claims for attorneys fees). Absent a local rule, it is submitted that jurisdiction be retained only for a reasonable period of time. Cooter & Gell respectfully urges this Court to find, as a matter of law, that nearly four years is too long a time to retain jurisdiction.

Cooter & Gell's 1983 conduct by caselaw and judicial and scholarly thinking about Rule 11 that developed in the following years.[27]

II. THE IMPOSITION OF RULE 11 SANCTIONS SHOULD BE SCRUTINIZED UNDER VARYING STANDARDS OF REVIEW

Rule 11 requires differing standards of appellate review that reflect the varying functions which trial courts perform in deciding whether to impose sanctions and the appropriateness of particular sanctions. The District Court here was called upon to make a number of different determinations in the course of considering the Rule 11 motion. First, it had to determine what the Petitioner did or failed to do, which involved fact-finding similar to that which is required whenever a court is called upon to resolve disputed issues. This fact-finding is appropriately reviewed under a clearly erroneous standard. *See* Fed.R.Civ.P. 52(a).

Once the facts were found, the District Court had to decide whether they constituted a violation of the applicable legal standard which is set forth in Rule 11. In deciding, the District Court necessarily made a legal determination as to the sufficiency of the facts to support Respondent's claim of entitlement to sanctions. This determination is similar to that made by judges who are asked to grant summary judgment, to direct verdicts, and to render judgments notwithstanding verdicts, since Rule 11 sanctions may be imposed only when no lawyer who was acting reasonably under the circumstances would have filed the paper. The typical standard of appellate review is *de novo* consideration of this type of district court determination. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153-61 (1970) (summary judgment); *Neely*

[27] It should be noted that the complaint in this case was filed on November 29, 1983—not even three months after the effective date of the amended Rule 11. *See also supra* note 13.

v. Martin K. Eby Constr. Co., 386 U.S. 317, 322-26 (1967) (judgment notwithstanding the verdict); *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966) (motion to dismiss).

Finally, if Rule 11 has been violated, the district court must determine what sanction "shall" be imposed. Since this determination involves a certain amount of equitable consideration and basic notions of fairness under the circumstances, the abuse of discretion standard is appropriate. But, even under this standard, it is important for the trial judge to set forth the reasoning that justifies the sanction selected. This is never more important than when a substantial financial penalty is sought to be imposed. If the financial penalty is intended to recompense an injured party for costs incurred, the findings that the district court makes in justification of the award are crucial to appellate consideration of the exercise of the judge's discretion.

Accordingly, a three-tier standard of review is appropriate for Rule 11. The Eighth and Ninth Circuits have adopted this precise approach: disputed factual determinations of the district court are reviewed under a "clearly erroneous" standard, *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986), and the legal conclusion that the facts constitute a violation are reviewed *de novo*. *Id.* Only the appropriateness of the sanctions imposed is reviewed under an abuse of discretion standard. *Id.*; *accord Kurkowski v. Volcker*, 819 F.2d 201, 203 n.8 (8th Cir. 1987).

In contrast to the approach adopted by the Eighth and Ninth Circuits, the D.C. Circuit has held that the district court is accorded wide discretion in determining whether factual or bad faith reasons exist which may give rise to sanctions under Rule 11 because "the district court has tasted the flavor of the litigation and is in the best position to make these kinds of determinations." *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174

(D.C. Cir. 1985).[28] Accordingly, a district court will be reversed if the Court of Appeals finds that it abused its discretion in finding the facts and/or applying the law of Rule 11 decisions to those facts. Once the district court determines that a violation has occurred, the selection of an appropriate sanction is committed to its discretion. *Westmoreland*, 770 F.2d at 1174. Thus, under *Westmoreland*, the factual findings of the district court, application of the law to those facts and both the amount and division of sanctions are measured against the "abuse of discretion" standard. *Id.* Consistent with *Westmoreland* and other D.C. Circuit cases, the D.C. Circuit appears to have evaluated all of the District Court's findings here under the "abuse of discretion" standard.[29]

Because of the stigma attached to the imposition of Rule 11 sanctions, however, Petitioner urges this Court to require the courts of appeals to more closely scrutinize the district courts' decisions to impose sanctions. Thus, Petitioner urges adoption of the three-tier standard of review, particularly *de novo* review of the determination that a violation occurred. *De novo* review of the critical

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[28] Other cases employing an across-the-board abuse of discretion standard include: *Thomas v. Capitol Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988); *Cotner v. Hopkins*, 795 F.2d 900, 903 (10th Cir. 1986); *Stevens v. Lawyers Mutual Liab. Ins. Co.*, 789 F.2d 1056, 1060 (4th Cir. 1986).

[29] Although the Court of Appeals opinion does not specifically state what standard of review is employed to review the ultimate issue of whether a violation occurred, it does not appear to depart from the other D.C. Circuit cases which embrace the "abuse of discretion" standard for the various issues under review here. *See, e.g., Adams v. Pan American World Airways*, 828 F.2d 24, 32 (D.C. Cir. 1987) (district court's ruling denying sanctions may be overturned only if the court abused its "wide discretion"); *IBT (Airline Div.) v. Ass'n of Flight Attendants*, 864 F.2d 173, 176 (D.C. Cir. 1988) (district court is accorded "wide discretion" in determining lack of factual basis); *Westmoreland*, 770 F.2d 1168 (same).

Rule 11 determination will promote two goals: uniform application of the rule, and avoidance of damage to an attorney or law firm's reputation resulting from the discretionary rulings of a lone trial judge.

Judge Schwarzer, of the Northern District of California, writes that the application of Rule 11 is confused and that the courts' standards are unpredictable. Schwarzer, *Rule 11 Revisited*, 101 Harv. L. Rev. 1013 (1988). In Judge Schwarzer's view, this raises an issue of fairness, because "[s]anctions may have penal consequences, including injury to a lawyer's reputation, investigation by state bar associations, and adverse effects on malpractice insurance coverage." *Id.* at 1017. Judge Schwarzer's views are not exaggerated. As a result of the recent publication of the D.C. Circuit's opinion in *Danik*, an investigation into this matter has been initiated by the District of Columbia Bar. In addition, opposing counsel in other cases have used the sanction award as a threat to various members of the law firm, including bringing it to the attention of the court in at least one other unrelated case. Such consequences may well be appropriate in particular cases, but fairness requires that those cases be defined with reasonable certainty and predictability. *Id.*

The lack of overall uniformity in Rule 11 sanctions has created an impression of arbitrariness, "as judges and jurisdictions with different sanctioning records have imposed varying sanctions on similarly situated violators." Untereiner, *A Uniform Approach to Rule 11 Sanctions*, 97 Yale L.J. 901, 903 & nn.17-22 (1988). Thus, one of the problems with the abuse of discretion standard is that it fails to put attorneys on notice of what conduct is expected of them.[30] Disagreement among judges has produced widely disparate results, thereby undercutting Rule 11's usefulness. *Id.* at 912-14. *See,*

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[30] *See* Schwarzer, 101 Harv. L. R. 1013 & n.22.

e.g., Eastway Construction Corp. v. City of New York, 821 F.2d 121, 126 (2d Cir.), *cert. denied*, —— U.S. ——, 108 S. Ct. 269 (1987). (Pratt, J. dissenting) ("apparent disparities, even capriciousness, [now seem] to characterize much of Rule 11 jurisprudence"). As one commentator has noted:

> [I]t is apparent that not all judges agree, in philosophy or in practice, on precisely what conduct constitutes a violation of the rule. *Practicing under Rule 11 is like negotiating a minefield. You know there will be an explosion if you step on a mine. The trouble is, you don't know where the mines are.*

Joseph, *The Trouble With Rule 11—Uncertain Standards and Mandatory Sanctions*, 73:8 A.B.A. J. 87, 88-9 (1987) (emphasis added).

Beyond not providing attorneys with fair notice of what conduct is expected of them, the abuse of discretion standard further chills creative litigation as it insulates the personal views of the trial court in the sanctioning process. For example, in a study sponsored by the Federal Judicial Center to examine the views of federal judges regarding Rule 11, it was discovered that some trial courts were more likely to sanction certain types of litigants than others. Civil rights litigants are particularly more likely to be sanctioned. Note, *Rule 11 Sanctions: Toward Judicial Restraint*, 26 Washburn L.J., 337, 371-73 (1987) (citing S.M. Kassin, *An Empirical Study of Rule 11 Sanctions*, 38 & n.77 (Federal Judicial Center 1985)). Other studies have reached the same conclusion, and have specifically found that plaintiffs and their counsel are consistently sanctioned more frequently than defendants. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200 (1988).[31]

[31] The fear of many critics that Rule 11 would become part of every defendant's litigation bag was not ill-founded. The reported cases confirm that Rule 11 is being used disproportionately against plaintiffs, especially in certain types of litigation, including, as here, antitrust cases brought by small companies. Vairo, *supra*, 118 F.R.D. at 200.

Mindful of the role—albeit unconscious—that the personal views of trial judges play in judicial decision-making, the Ninth Circuit Court of Appeals has noted that there exists a great "risk when mandatory sanctions ride upon close judicial decisions. The danger of arbitrariness increases and the probability of uniform enforcement declines." *See* 26 Washburn L.J. at 371 n.142 (quoting *Golden Eagle Dist. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1541 (9th Cir. 1986)). To protect against the imposition of mandatory sanctions influenced by the personal views of the trial court, Petitioner respectfully urges a more particularized standard of review by the appellate court.

The Court of Appeals in this matter was as well positioned to judge the conduct of the parties as was the District Court. There was little "flavor" to the litigation in that barely five months elapsed from filing the complaint to its dismissal; there was never any live testimony; and all of the evidence submitted on the Rule 11 Motion was written, or part of the transcribed oral argument before the District Court.[32] Indeed, the questions presented here—apart from the amount and division of

[32] In fact, recognizing that this matter dealt with conduct of members of the bar, the Court of Appeals went well beyond the record in its questioning of the parties at oral argument. Transcript of Oral Argument at 72-73 [hereinafter "Transcript"]. For example, Mr. Cooter advised the Court of Appeals that, prior to filing the lawsuit, he had contacted sources within the men's clothing industry that confirmed the existence of retail price maintenance agreements for the Hartmarx and Hickey-Freeman merchandise. Because these sources had requested confidentiality, the fact of this inquiry was not presented to Judge Gasch during the 1984 argument on the Rule 11 motion. Transcript at 21-22; 35-38. Nevertheless, despite the Court of Appeals' concern about the importance of this matter involving the conduct of a member of the bar, its opinion focuses only on those matters that were specifically presented to Judge Gasch.

sanctions between attorney and client—are analogous to the appeal of the granting of a motion for summary judgment. As such, *de novo* review of the District Court's finding of a Rule 11 violation was entirely supportable. *Int'l. Union v. National Right To Work Legal Defense Foundation, Inc.*, 781 F.2d 928, 933 (D.C. Cir. 1986).

As set forth above in the Statement of the Case, the District Court imposed sanctions in a case where the following facts were undisputably true and implicitly regarded as irrelevant:

1. Petitioner had been informed about industry practice by its clients, who had substantial experience in the men's clothing business.

2. The allegations made by the clients with respect to price discrimination in the *Intercontinental* suit were corroborated by an independent investigation, and these allegations involved a number of cities outside the Washington area.

3. Prior to filing a complaint in the class action suit, Petitioner made telephone calls to several major cities and received information that corroborated the information they had received from their clients. The information was not inconsistent with a nationwide practice on the part of Respondents.

4. Prior to filing the complaint, Petitioner provided copies to Hartmarx's general counsel and to Respondent's outside counsel and offered to give them as much time as was required for them to analyze the complaint. Petitioner provided an extension of time when asked. No suggestion was made by Respondents that the allegations concerning exclusive dealing, which was the key to inflating prices according the complaint, were incorrect.

5. Respondents were fully aware that when representations had been made by Respondents concerning the prices charged to Danik's competitors in the Intercontinental case, Petitioner carefully and faithfully arranged to examine the relevant documents to ascertain whether the representations were correct. Although Petitioner concluded that Respondents' outside counsel had given them information that did not appear to be consistent with what Petitioner learned in discovery in the *Intercontinental* case, and expressed reservations about believing additional representations, at no time did Petitioner ever express any reluctance to investigate fully any information that might have suggested that its factual theory or the information provided by its clients was incorrect.

6. Petitioner had offered to make available for depositions any of its lawyers to explain their reliance on Danik's information and the ways in which they sought to corroborate it.

These facts were all revealed in the record before the Court of Appeals but, in the main, neither discussed nor given any weight in affirming the District Court. Petitioner submits that under a standard of *de novo* review, giving these facts appropriate consideration would have resulted in reversal of the District Court.

In addition to the ultimate question of whether sanctions should be imposed, *de novo* review is also appropriate for two other issues: whether the District Court applied appropriate procedures to the resolution of the Rule 11 issue; and whether the proponent of the motion should be estopped by its own conduct from benefitting from Rule 11.

Not only must the district court decide whether the facts support a Rule 11 claim, but the court must also decide what procedures are permissible and appropriate in making Rule 11 determinations. Procedural issues are questions of law, and appellate courts must determine whether district courts acted properly in making Rule 11 determinations, and in doing so they must decide for themselves the sufficiency of the procedures which were employed. Here, the District Court made no findings to

support its conclusion that the motion was "ripe for decision" or why four years was a reasonable delay. In the Court of Appeals argument, Judge Starr commented on the four year delay, but concluded that he was "not sure what we do with it." Transcript at 5. Petitioner submits that a four year delay in imposing sanctions is a procedure that would not withstand scrutiny under *de novo* review.

A *de novo* standard of review is also appropriate when, as here, a claim is made that a party seeking Rule 11 sanctions has failed to mitigate and is estopped from attributing to the plaintiff costs which mitigation would have avoided.[33] Whether there is a duty to mitigate and what the scope of the duty is are questions of law, and *de novo* review generally governs appellate review of such legal issues. *See Business Systems Leasing, Inc. v. Foothills Automotive Plaza, Inc.*, 886 F.2d 284, 287 (10th Cir. 1989) (duty to mitigate is issue of law and reviewed *de novo*); *R & O Elevator Co., Inc. v. Harmon*, 93 Bankr. 667, 670 (D.Minn. 1988) (same). Here, Respondents were given the complaint and unlimited time to review it. Nevertheless, Respondents failed to advise Petitioner of their position that the factual allegations were not well-founded. The impact of this failure should have been scrupulously re-examined by the Court of Appeals. The District Court observed that its research revealed no other case in which there were similar circumstances. (Cert. P. App. at 27a). This is not surprising, since it is unconscionable for a litigant who has been given an opportunity to review a complaint which has a core allegation—*i.e.*, the defendants are artificially inflating prices and using exclusive dealing arrangements as part of their collusive efforts to fix and inflate prices—to

[33] Judge Gasch made no specific findings of fact to support the amount of sanctions awarded. His failure to do so is particularly problematic here, as Respondents certainly could have mitigated their damages if they had advised Petitioner informally that there were problems with the draft complaint.

possess information that would readily refute the core allegation, to refrain from disclosing to the plaintiff the defendants' belief that the core allegation is erroneous, and thereafter to seek Rule 11 sanctions. As Respondents' counsel candidly stated in oral argument to the District Court "[t]he exclusive retailer policy allegation is repeated no less than 20 times in the class action complaint." (J.A. 47). Yet, it is this part of the complaint which is attacked in the Rule 11 motion, and Respondents could have brought to the plaintiff's attention any information bearing on this part of the complaint when they were afforded the opportunity to review it.[34]

Admittedly, in recent years this Court has moved towards deferential review of federal trial court decisions involving findings of ultimate fact going to the merits. Yet, that move has not been immutable. Although the Court stated in *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 501 (1984), that the "clearly erroneous" standard set forth in Fed.R.Civ.P. 52(a) "applies to findings of fact, including those de-

[34] In the Court of Appeals, Respondents revealed for the first time that they had an "800" telephone number which they claimed Petitioner might have called to determine where Respondents' retailers were located. (Transcript at 51). The District Court was never informed of such a number, nor was the Court of Appeals told when the number was first instituted. Presuming, however, that the number was in use at the time that Petitioner gave a copy of its proposed complaint to the Hartmarx general counsel and to Respondents' outside counsel, it is apparent that both in-house and outside counsel deliberately chose not to disclose the existence of the telephone number to Petitioner. Had the number been disclosed, and had Petitioner failed to investigate it, a Rule 11 challenge might have been understandable. But Respondents did not disclose the number, and it is difficult to imagine a clearer failure to mitigate. Respondents cannot seriously complain that they were burdened in responding to Danik's complaint when they invited Danik to file it and deliberately chose not to call to Petitioner's attention basic information which was readily available to Respondents and which they could have provided to Petitioner at no cost.

scribed as 'ultimate facts' because they may determine the outcome of litigation," the Court also reaffirmed that in cases where there is a claim of denial of rights under the constitution, *de novo* review of the evidence is mandated. 466 U.S. at 509-11. *De novo* review is required, it seems, because the constitutional issues are too important to leave to the trier of fact. *Id.*

In determining the appropriate standard of review in *Pierce v. Underwood*, —— U.S. ——, 108 S.Ct. 2541, 2547 (1988), the Court focused on two "significant relevant factors": (1) the language of the governing statute; and (2) the sound administration of justice. There, in reviewing an attorney's fee award under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), this Court found that the statutory language suggested, but did not compel, deferential review. 108 S.Ct. at 2547. Here, a rule of this Court, not a statute, is being reviewed. This Court clearly established an objective, not a discretionary, standard in Rule 11. Whether a violation occurred is a question of law that requires *de novo* review. The mandatory nature of sanctions under the amended rule also militates in favor of *de novo* review. Once a violation is found the district court is given "discretion to tailor sanctions to the particular facts of the case." *See* Advisory Committee Notes, 97 F.R.D. at 200.

As to the "sound administration of justice," the inquiry is whether " 'one judicial actor is better positioned than another to decide the issue in question.' " *Pierce*, 108 S.Ct. at 2547 (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). Concluding that the "sound administration of justice" called for deferential review, this Court stated:

> . . . the question whether the Government's litigating position has been 'substantially justified' is precisely such a multifarious and novel question, little susceptible, *for the time being at least*, of useful generalization, and *likely to profit from the experience that an abuse-of-discretion rule will permit to develop.*

108 S.Ct. at 2548 (emphasis added). In contrast to the situation confronting the Court in *Pierce*, experience under amended Rule 11 has vividly demonstrated that uniformity and consistency are needed, and that the more widely-adopted abuse of discretion standard has resulted in confusion and inconsistency.

Moreover, the *Pierce* Court noted:

> It must be acknowledged that militating against the use of that standard in the present case is the substantial amount of the liability produced by the District Judge's decision. *If this were the sort of decision that ordinarily has such substantial consequences, one might expect it to be reviewed more intensively.* In that regard, however, the present case is not characteristic of EAJA attorney's fee cases. The median award has been less than $3,000.

108 S.Ct. at 2549 (emphasis added). As set forth above however, Rule 11 decisions do result in "substantial consequences"—both monetarily [35] and to the reputation of the attorney and the firm—thereby requiring more intensive review.

Under any standard, the district court should be required, by local rule or by practice in particular cases, to require that the court should award sanctions, if necessary, within a reasonable time after a case is terminated. A four-year delay in awarding sanctions is a clear abuse of discretion. It permits a district court to chill the behavior of any lawyer against whom a sanctions motion is pending or might be filed (or even raised *sua sponte* by the court) in every other case the lawyer

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[35] Petitioner was sanctioned $21,402.52 and Danik was sanctioned $10,701.26. In other cases, sanctions have been even greater. *See, e.g., Avirgan v. Hull*, 705 F. Supp. 1544 (S.D.Fla. 1989) (sanctions of $1,034,381.36); *In re Matter of Yagman*, 796 F.2d 1165 (9th Cir. 1986) (reversing award of $250,000 in sanctions).

has pending in that court. A greater chill on an attorney's ability to advocate for his clients is difficult to imagine.

III. ABSENT A FINDING THAT THE APPEAL WAS FRIVOLOUS, SANCTIONS SHOULD NOT BE IMPOSED FOR THE APPEAL

The Court of Appeals found that the District Court's award under Rule 11 should also include appellate expenses incurred in defense of that award, and remanded the case back to the District Court for a determination of those fees and costs. *Danik, Inc. v. Hartmarx Corp.*, 875 F.2d 890, 897-98 (D.C. Cir. 1989); *accord Hays v. Sony Corp. of America*, 847 F.2d 412, 419 (7th Cir. 1988).[36] Rule 11 does not speak to the issue of further fees on appeal. Rule 38 of the Federal Rules of Appellate Procedure provides:

> If a court of appeals shall determine that an appeal is frivolous, it may award past damages and single or double costs to the appellee.

There was no finding by the Court of Appeals that Cooter & Gell's appeal was frivolous.[37] Indeed, on October 5, 1988, the Court denied Hartmarx's motion for summary affirmance of the District Court's imposition of sanctions and specifically instructed the parties to brief the issue of whether the Rule 41 voluntary dismissal divested the District Court of jurisdiction to impose sanctions. Moreover, the granting of certiorari by this Court further

[36] Interestingly, on September 29, 1989, another panel of the D.C. Circuit imposed appellate fees in a Rule 11 case by specifically finding the appeal to be frivolous under Fed.R.App.P. 38. *See Saltany v. Reagan*, 886 F.2d 438, 440 (D.C. Cir. 1989).

[37] Rule 38 and 28 U.S.C. § 1912 are read together to allow sanctions for frivolous appeals. *See* Joseph, *supra* note 15 at 408-409. Thus, in another case, if the appeal is found to be frivolous, Rule 38 and § 1912 will provide an adequate remedy, without expanding the reach of Rule 11.

buttresses Cooter & Gell's position that the appeal to the D.C. Circuit was not frivolous.

The Court of Appeals, relying upon *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 729 F.2d 469, 475 (7th Cir. 1984), based its award of sanctions for the appeal on the premise that "requiring a party to bear appellate expenses . . . 'could greatly offset the amount of the sanction and thus create a disincentive for seeking sanctions.'" Cert. Appendix at 14a (*quoting Tamari*, 729 F.2d at 475).[38] Conversely, however, requiring the losing party to bear the appellate expenses would create a disincentive to *non-frivolous* challenges to an award of sanctions. This result is particularly chilling where, as here, the District Court's imposition of sanctions is reviewed under an abuse of discretion standard.

In a typical lawsuit resulting in a money judgment to a plaintiff, a defendant's appeal very often offsets the amount of the judgment. Under the reasoning of the D.C. Circuit, this offset would create a disincentive for seeking the judgment in the first place. Nevertheless, absent a finding that the appeal is frivolous, each party bears its own appellate attorneys fees. There is no reason to deviate from this well-established rule in the case of Rule 11 sanctions. Non-frivolous appeals should not be discouraged, and a party who believes he has been wronged by the trial court should not be fearful of taking an appeal because to do so may compound the amount of fees awarded against him.

Moreover, the position adopted by the D.C. Circuit results in an obvious imbalance: those who have been sanctioned by the district court would be discouraged from appealing, while those who unsuccessfully sought district

[38] Any prevailing party in a Rule 11 proceeding can keep its appellate costs down by relying on the district court's findings and reasoning on appeal.

court sanctions would be free to assert a non-frivolous appeal without worrying about sanctions.

This case reveals the importance of allowing parties who have been sanctioned the right to appeal without fearing the imposition of further costs. The developing Rule 11 comment and caselaw cry out for a uniform and correct approach to the imposition of sanctions, and lawyers should not be penalized, as Petitioner was here, for attempting to clarify the law or bring it into conformance with what other courts have done. Petitioner has been unable to find any other case involving a four year delay in imposing sanctions; that delay, in and of itself, provides grounds for an appeal, given the chilling effect of the delay. To further sanction the appeal only further chills the zealousness of the federal bar, a result which is plainly wrong.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the judgment of the United States Court of Appeals for the District of Columbia Circuit be reversed, and remanded for further proceedings consistent with the legal arguments set forth above by Petitioner.[50]

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[50] If this Court rules in *Pavelic & Le Flore v. Marvel Entertainment Group*, 854 F.2d 1452, *cert. granted*, —— U.S. ——, 109 S. Ct. 1116 (1989), that sanctions may not be, as they were here, imposed against an entire law firm, Petitioner respectfully requests that this case be reversed on grounds of plain error. The Respondents here did not appeal the District Court's decision to impose sanctions against the firm, but not against any individual lawyer.

Respectfully submitted,

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